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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GABINO ROMAN MENDOZA,

Defendant and Appellant.

G039337

(Super. Ct. No. 06CF3499)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Gabino Roman Mendoza of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))¹, possession of cocaine base for sale (Health & Saf. Code, § 11351.5), possession of methamphetamine for sale (Health & Saf. Code, § 11378), and street terrorism (§ 186.22, subd. (a)). The jury found defendant possessed the gun, cocaine base, and methamphetamine for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The jury further found defendant was personally armed while possessing the cocaine base and methamphetamine. (§ 12022, subd. (c).) Defendant admitted, and the court found true, he suffered a prior felony conviction described in Health and Safety Code section 11370.2, subdivision (c). The court sentenced defendant to a prison term of 14 years, including three years for the gang enhancement relating to his possession for sale of cocaine base. On appeal defendant contends (1) insufficient evidence supports his convictions for street terrorism and possession of drugs for sale, and the gang enhancements, and (2) the court abused its discretion by admitting allegedly unauthenticated photographs supporting the street terrorism charge and the gang enhancements. We affirm.

FACTS

On the afternoon of November 2, 2006, a large group of police officers arrived at a Santa Ana apartment where defendant lived with his mother, brother, sister and, according to defendant, two other adults and a child. (The People and defendant stipulated the Santa Ana Police Department and other law enforcement officers went to the apartment to lawfully contact defendant and they lawfully entered the apartment.) The officers knocked and announced their presence “for several minutes without response.” After about 20 minutes, the police forced open the front door and entered the

¹ All statutory references are to the Penal Code unless otherwise stated.

apartment. Inside the two-bedroom apartment were defendant and his mother and younger brother and sister.

Inside the southeast bedroom (where the police initially found defendant) were a loaded .45 caliber handgun concealed in a light fixture, about eight or nine empty baggies (of a small size measuring about one inch by one inch) hidden by the bed, “two loose rounds of handgun ammunition” (possibly 9 millimeter and .40 caliber) on the floor by the bed, and a cell phone on the dresser.

Inside the southwest bedroom were 44 rounds of .22 caliber ammunition in a box on top of a dresser, a digital scale on the top of that dresser, and 10 grams of cocaine base (also known as rock cocaine) in a drawer of that dresser. In a different dresser in that bedroom, police found many baggies containing cocaine powder and a total of 25 grams of methamphetamine in one drawer, and in a different drawer about 15 color photographs “of various males in poses, standing in front of buildings in what appeared to be the 800 block of south Townsend Street.” An officer who entered the apartment about “10 to 15 minutes after [the] initial entry” testified the bedroom doors “were wide open” and no keys were “found for the southwest bedroom door.” He was “not sure” if either of the bedroom doors appeared to have been forced open.

In the living room was a Minnesota Twins baseball cap bearing the letters “TC.”

Speaking to an officer at the apartment, defendant stated the handgun belonged to him and he kept it in the bedroom “or on his person . . . to protect himself.” He stated “he is a Townsend Street Gang member” with the moniker “Taz,” and that the gang’s “primary source of revenue” is the sale of drugs on Townsend Street. As a result, “he needs the gun to protect himself.” Defendant said he knew he was not supposed to possess a gun because he is a convicted felon. He stated he uses some cocaine base “for his own personal use,” then sells the rest on Townsend Street and nets a profit for himself. The police did not discover any paraphernalia in the apartment “that might be

used to ingest drugs.” Defendant asserted that two adults and a child lived in the southwest bedroom. He claimed “he had no idea about [the drugs found in the southwest bedroom] or how they got there.” He stated he did not think the drugs belonged to the tenants of that room and “he had never seen them buying or selling drugs.” Other than statements by defendant and his family members that someone else lived in the apartment with them, there was no evidence of any additional occupants. There was a queen-sized bed in the southwest bedroom and a full-sized or smaller bed in the southeast bedroom.

At trial a gang expert testified the Townsend Street Gang has about 50 members and its common name or symbol is “CT” (for Calle Townsend) or “T” (for Townsend). Its members often wear the Minnesota Twins’ TC hat. The gang’s primary activities are “sales of narcotics, assault with deadly weapons, murders, and witness intimidation.” The gang expert opined defendant is an active participant of the gang based on the following: The expert had contacted defendant at least five times in the gang’s territory. Defendant “admit[ted] to being Taz from Townsend,” “was found in possession of a Minnesota Twins City hat” and a gun, [knew] the gang “receives money from narcotics sales,” has had at least four contacts where he admitted being a gang member or possessed the gang shirt, hat or color or was with another Townsend Street Gang member, and had previously received two STEP Act (Street Terrorism Enforcement and Prevention Act) notices advising him he was a member of the gang. The cell phone found at his apartment “contained phone numbers of Townsend Street Gang members.” The expert identified individuals in four photographs found in defendant’s apartment as Townsend Street Gang members. One photograph was taken in front of defendant’s apartment building; another was shot in front of a wall covered with Townsend Street Gang graffiti. In a search of defendant’s residence in 2005, police found “some letters from gang members in jail.”

DISCUSSION

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence supporting his convictions for possession for sale of methamphetamine and cocaine. In a separate argument, he challenges the sufficiency of the evidence supporting the gang enhancements relating to his convictions for possession of a gun by a felon and possession of cocaine and methamphetamine.

To determine whether the evidence is sufficient, we “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “Under this standard, the [reviewing] court does not “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) “In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same.” (*People v. Hale* (1999) 75 Cal.App.4th 94, 105.) Further, “[t]his standard applies to a claim of insufficiency of the evidence to support a gang enhancement.” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Substantial Evidence Supports Defendant's Convictions for Possession of Methamphetamine and Cocaine for Sale

As to the drug offenses and their corresponding enhancements, defendant contends there was insufficient evidence he exercised dominion and control over the drugs and therefore his convictions for possession for sale of methamphetamine and cocaine must be reversed.

“The essential elements of the offense of unlawful possession of a controlled substance are actual or constructive possession in an amount sufficient to be used as a controlled substance with knowledge of its presence and its nature as a controlled substance. The elements may be proven by circumstantial evidence” (*People v. Rushing* (1989) 209 Cal.App.3d 618, 621), and by “any reasonable inferences drawn” from the evidence. (*People v. Estrada* (1965) 234 Cal.App.2d 136, 155.) In addition, “one may become criminally liable for possession for sale . . . of a controlled substance, based upon either actual or constructive possession of the substance.”² (*People v. Morante* (1999) 20 Cal.4th 403, 417.) “Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another.” (*Ibid.*) Thus, the ““narcotics need not be found on the person of the defendant; it is sufficient if they are deposited in a place under the possession and control of the accused. Exclusive possession of the premises is not necessary nor is physical possession of the drug of the essence.”” (*People v. Estrada, supra*, 234 Cal.App.2d at p. 155.) “A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others.” (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.)

But simply having access to a place, “without more, will not support a finding of unlawful possession.” (*People v. Redrick* (1961) 55 Cal.2d 282, 285.) “[N]o

² Defendant does not challenge the jury’s finding the drugs were possessed for sale.

sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic in a place to which he had access, but not exclusive access, and over which he had some control, but not exclusive control." (*Id.* at p. 287.) Examples of "evidential factors which, added to nonexclusive dominion, will support a finding of knowing possession" (*ibid.*) include a "showing of consciousness of guilt" (*id.* at pp. 287-288) or "that the drug was found among defendant's personal effects." (*Id.* at p. 287.) "[T]he totality of circumstances will determine whether a defendant has exercised the requisite control over contraband in the hands of another." (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 539.)

Defendant contends the evidence was insufficient to establish he had dominion and control over the cocaine and methamphetamine. He argues the southwest bedroom "was occupied by an unidentified couple." He asserts the "prosecution produced no evidence [he] had access to that bedroom or the right to control anything in it." He contends there was no evidence "whether the door to the southwest bedroom was open, closed or locked when [the police] arrived." Relying on *People v. Redrick, supra*, 55 Cal.2d at page 285, he argues his "mere opportunity to access the southwest bedroom would not support a finding of constructive possession."

Contrary to defendant's contention, and viewing the evidence in the light most favorable to the judgment, substantial evidence showed defendant knew of the presence of the controlled substances and exercised the requisite control over them to constitute constructive possession. Defendant admitted he lived in the apartment, sells drugs on Townsend Street, is a Townsend Street Gang member, and possessed the gun to protect himself. He stated the Townsend Street Gang's main revenue source is the sale of drugs on Townsend Street. He stated he is a cocaine user, but no paraphernalia supporting his claim was found in the apartment. He claimed he had never seen the couple (who supposedly occupied the southwest bedroom) buy or sell drugs. Based on

this information provided by defendant himself, the jury could reasonably infer defendant exercised control, whether exclusive or nonexclusive, over the drugs. Additional evidentiary factors included (1) the Townsend Street Gang photographs found in the same dresser in the southwest bedroom as the methamphetamine and cocaine powder; (2) the empty baggies hidden in the southeast bedroom (which defendant claimed he and his family shared) which were “the same type of bag” discovered in the southwest bedroom containing cocaine powder; (3) the cell phone found in the southeast bedroom with contact information for Townsend Street Gang members; and (4) the gang expert’s testimony about the Townsend Street Gang and defendant’s participation in it. There was no evidence anyone else in the apartment was a Townsend Street Gang member. Defendant’s contention the prosecution failed to show he had access to the southwest bedroom is unpersuasive. An officer who entered the apartment within 10 to 15 minutes of the initial entry, observed the bedroom doors to be wide open; no keys to the southwest bedroom door were found. In sum, substantial evidence showed defendant knowingly possessed the drugs for sale.

Substantial Evidence Supports the Gang Enhancements

Defendant contends the evidence is insufficient to support the jury’s findings he possessed the gun and the drugs for the benefit of a criminal street gang.

Under section 186.22, subdivision (b)(1), “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall” be punished with an additional term.

In *People v. Ferraez* (2003) 112 Cal.App.4th 925, the defendant was arrested trying to sell drugs in the territory of a gang “on friendly terms” with his gang. (*Id.* at p. 931.) On appeal he contended the evidence was insufficient to show “he intended to further [his] gang’s felonious conduct by selling drugs.” (*Id.* at p. 929.) He

argued ““there was direct, credible evidence that [his] intent in selling dope was *not* gang-related, but rather entirely personal: to quickly get \$400 with which to buy himself a car.”” (*Id.* at p. 930.) This court disagreed and concluded substantial evidence showed “the drug offense was gang related” (*id.* at p. 931) because a gang expert in response to a hypothetical question, opined the defendant intended to sell the drugs for the benefit of his gang, and because the defendant told the arresting officer he had received permission from a friendly gang to sell drugs in their claimed territory. (*Id.* at pp. 928-930.) We explained: “It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.] While there may be instances when it is improper for an expert to express an opinion on an ultimate issue such as specific intent [citation], this is not one of them. Here, the gang expert’s testimony was necessary to explain to the jury how a gang’s reputation can be enhanced through drug sales and how a gang may use the proceeds from such felonious conduct. These are matters ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact’” (*Id.* at pp. 930-931.) We cautioned that the gang expert’s testimony alone would *not* have constituted sufficient evidence to support the gang enhancement. (*Ibid.*) But the defendant’s statement a friendly gang let him sell drugs at the location where he was arrested was “other evidence from which the jury could reasonably infer the crime was gang related.” (*Id.* at p. 931.)

Here, based on a hypothetical question, the gang expert opined an identified and documented Townsend Street Gang member who is present in his apartment where a certain amount of methamphetamine and cocaine possessed for the purposes of sales is found, possesses the drugs for the benefit of the gang. The gang expert testified that typically a gang’s main source of income is derived from “narcotics sales and taxing the local drug dealers.” The “Townsend Street Gang is involved in the sales of methamphetamine, cocaine, and cocaine base” in order to “make money, big money, to

buy more drugs, to make money to support their gang parties, to support their gang members who have been arrested and need money for the commissary, for the time they are in jail, [and] to buy more weapons.” The Townsend Street Gang’s drug sales took place on Townsend Street.

Based on another hypothetical question, the gang expert opined that an identified and documented Townsend Street Gang member who is present in his apartment where a loaded .45 caliber handgun is found and who tells police the weapon “is his firearm, that he uses it for protection, and for the sale of drugs,” possesses that gun for the benefit of the gang. A gun owned by a gang is used to commit shootings, such as drive by shootings, and for protection, and is “readily accessible to all the members of the gang.” The gun benefits the gang because the gang uses the gun for “offensive and defensive purposes against rival gangs,” “for intimidation, and for respect throughout the gang.” The Townsend Street Gang engaged in “sales of narcotics, assault with deadly weapons, murders, and witness intimidation.”

These opinions of the gang expert, which “were properly rooted in the evidence presented at trial” (*People v. Ferraez, supra*, 112 Cal.App.4th at p. 930), along with defendant’s statements he is a Townsend Street Gang member and sells drugs on Townsend Street, he knows Townsend Street Gang’s main source of revenue is from drug sales, and he owns the gun for protection, constitute substantial evidence supporting the gang enhancements.

Authentication of Photographs

Defendant contends the court abused its discretion by admitting into evidence four photographs of Townsend Street Gang members over defense counsel’s objection the photographs lacked foundation. Defendant concludes the gang offense and enhancements must be reversed.

At trial, an officer testified he found in a dresser drawer in the southwest bedroom of defendant's apartment "numerous" color photographs "of various males in poses" on Townsend Street. Four of the photographs were marked for identification and recognized by the testifying officer as photographs he found in defendant's apartment. The gang expert recognized the photographs as ones found in defendant's apartment. The gang expert identified the names and monikers of Townsend Street Gang members in the photographs, their gang hats and tattoos, as well as the gang's graffiti on a wall in one photograph and defendant's apartment complex in another.

After the People rested their case, defense counsel objected to the introduction of the photographs into evidence, arguing they lacked foundation because "no one knew when [they] were taken, the circumstances under which they were taken, [and] who took them." The prosecutor argued the "officer said he recovered them from the house, [and] he recognized the location where the photographs were taken and the individuals depicted in the photographs." The court observed that, although defendant was not in any of the photographs, the photographs appeared to be offered into evidence "for the purpose of establishing a connection between the defendant and Townsend Street [Gang] by virtue of the possession of the photographs," and "the inability of the officer to identify the date they were taken or the age of the persons contained in the photograph" did not defeat foundation. Accordingly, the court overruled defense counsel's objection.

"Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401, subd. (a).) "Writing" includes a photograph. (Evid. Code, § 250.) "The admissibility of authenticated photographs of places, persons, or things relevant to an issue is well established." (2 Witkin, Cal. Evidence (4th ed. 2000) Demonstrative, Experimental, and Scientific Evidence, § 14. p. 23.) "To authenticate a photograph, a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal knowledge of the correctness of the

representation. But it is not essential that the photographer be produced; any witness with such personal knowledge may lay the foundation.” (*Id.* at § 16, pp. 25-26.) A photograph may be authenticated “by the testimony of any person who has personal knowledge of what the photograph . . . represents.” (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Authentication and Proof of Writings, § 30.28, p. 669.) “The essential element is that it be shown in some way that the picture does correctly depict what it purports to show, in other words that it be verified or authenticated as a genuine picture of what it purports to depict.” (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409.)

A trial court’s ruling on the substantiality of foundational evidence is reviewed for abuse of discretion. (*Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178.)

Here, the photographs at issue were properly authenticated by a police officer and the gang expert based on their own personal knowledge. The officer recognized the photographs as ones he found in defendant’s apartment. He identified “the 800 block of South Townsend Street” in the photographs. The gang expert recognized Townsend Street, defendant’s apartment complex, gang graffiti, and various gang members in the photographs. He also recognized gang attire and tattoos on some of the photographed individuals. Thus, the gang expert’s testimony showed the photographs were faithful representations of the gang locations and members depicted, while the officer’s testimony showed the photographs were the ones found in defendant’s home. The photographs were thus authenticated for the purpose of showing defendant had a connection with the gang.

Defendant argues that “on the issue of authentication,” the “purpose for admitting the photographs does not matter.” Not so. In *People v. Mayfield* (1997) 14 Cal.4th 668, the defendant argued the prosecution failed to establish a “videotape fairly and accurately represented the scene as it existed at the time of the charged offenses

because it was made during daylight hours, whereas the relevant events occurred at night, and because it was made almost 18 months after the relevant events.” (*Id.* at p. 747.) Our Supreme Court found “the videotape was sufficiently authenticated” because it “was admitted only to show the height and location of walls and fences and what could be seen by looking over them at certain locations.” (*Ibid.*) “For these limited purposes, the lighting was irrelevant, and the prosecution elicited testimony that the walls and fences had not changed since the events in question.” (*Id.* at p. 747.) Thus, the videotape was properly authenticated for the purpose for which it was admitted.

Defendant contends the authentication of a photograph must always include testimony by “someone with personal knowledge of the events in the photographs . . . that the photographs are not the result of the creative use of photographic editing tools,” such as airbrushing or digital modification. He relies solely on *Mendler v. Winterland Production, Ltd.* (9th Cir. 2000) 207 F.3d 1119 for this proposition, but that case does not support defendant’s contention. *Mendler* involved the contractual interpretation of a licensing agreement of photographs. The issue of authentication of a photograph is not discussed at all in *Mendler*.

The trial court did not abuse its discretion in admitting the photographs into evidence.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.